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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

In the Matter of the Application of

JAMES F. MOONEY and others named in the schedule annexed hereto,

Petitioners,

vs.

SOLOMON HOBERMAN, as Personnel Director of the Department of Personnel of The City of New York and as Chairman of The Civil Service Commission of The City of New York; MILTON SAMORODIN and JAMES W. SMITH, as Commissioners of The Civil Service Commission of The City of New York; and THE CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK,

Respondents,

For an Order, pursuant to Article 78 of the Civil Practice Law and Rules, directing that the Respondents validate the Captains Promotional Examination given on January 18, 1969, and further directing that the action of the Respondents in cancelling the examination of January 18, 1969 and the setting of a new examination dated for May 24, 1969 be declared null and void, and further directing that the respondents be enjoined from conducting the said examination, now scheduled for May 24, 1969, pending the final determination of the within proceedings.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Jurisdiction

Respondents do not question the jurisdiction as set forth in the Petition other than to contend (1) that no substantial federal question is presented in the within case, and (2) that no such question was timely raised in the courts below.

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* In the Court of Appeals of the State of New York, this action was *sub. nom., "Matter of the Application of Arthur Katz and others v. Hoberman".*

Questions Presented

The questions presented, respondents contend, are not as the Petition for Certiorari states.

The question actually presented is whether under New York State law the action of the New York City Civil Service Commission in cancelling a promotion examination before any of the papers were graded and scheduling another examination in its place to be held shortly thereafter, was arbitrary, capricious or unreasonable, or involved illegality or bad faith, all within standards in this regard imposed by New York State law.

A second, subsidiary question, is whether the supposed substantial federal question was timely raised in the courts below.

Statutory and Administrative Provisions Involved

NEW YORK CITY CHARTER:

"Personnel Director, Powers and Duties.—

> § 813. The personnel director shall have the following powers and duties in addition to the powers and duties vested in him as the head of the department:
>
> * * *
>
> c. At the direction of the civil service commission, to schedule and conduct examinations for positions in the civil service;"

RULES AND REGULATIONS OF THE NEW YORK CITY MUNICIPAL CIVIL SERVICE COMMISSION:

> "Rule 4.5.4. Except as otherwise provided by resolution or regulation of the commission, no test, subject, part or record of an examination shall be subject to review, alteration or re-rating after the ratings of the examiners have been registered or attested thereon as required. However, the commission, at any time prior to the establishment or dur-

ing the existence of an eligible list, may correct any manifest error or mistake made in connection with an examination, on its own initiative or in the granting of a claim of manifest error or mistake. * * * The nature of such manifest error or mistake shall be set forth in its minutes."

Statement

On January 18, 1969, the written civil service examination in suit was held pursuant to the rules and regulations of the New York City Civil Service Commission for promotion to Captain in the New York City Police Department, the New York City Transit Police Department and the New York City Housing Authority Police Department. This is the same civil service examination that is the subject of the petition for a writ of certiorari to the Court of Appeals of the State of New York entitled, *Matter of the Application of John J. Elliott, et als, petitioners, against Solomon Hoberman, respondents,* October Term, 1971, No. , presently pending undetermined before this Court.

On March 18, 1969, and before any of the papers had been graded (32), the City Department of Personnel issued a press release advising that the examination had been cancelled that day and that a new examination was being scheduled for May 24, 1969, to take its place (43).

The press release gave as the basis for the Commissioner's action that investigation by the Assistant Director of Examinations had revealed that twelve of the questions were identical with questions previously published in the 1962 issue of the "Police Yearbook", that those twelve questions had been taken from a police promotion examination held in California in 1959, that the Personnel Department's examiners had obtained the questions from a California jurisdiction supposing them to be from an "unreleased" police promotion test and were unaware at the time that the questions had been published in the "Police Year-

book", and that the Yearbook itself had been available in the New York area for several years. For these reasons it was possible, the Commission Chairman said, that some candidates taking the examination had reviewed the twelve questions prior to the test (44). The questions themselves, he said, were "an essential part of the examination" (45), and to eliminate them would destroy the validity of the test (*ibid.*).

The release went on to state that the judgment of the Personnel Director was that inclusion of the questions impaired the "competitive nature of the examination", raised questions "concerning the integrity of the examining process and reduce(d) reliability of the test", all in violation of the New York Constitution, Article 5, § 6 (44).

The twelve questions used in the 1959 California police promotion test had been included in the 1962 Yearbook, and then in the January 18, 1969 examination, not only word-for-word but in the same order (61-62, 66-67, 87). The Yearbook was a publication of the Davis Publication Company that had been sold and distributed in the New York area for a number of years (87).

On March 24, 1969, there appeared in the New York City Record a notice of the new examination to take the place of the other and to be held on May 24, 1969 (13). Candidates who had filed for the January 18 test were not required to re-file (44, 58).

An affidavit filed by the respondent Personnel Director stated that respondents (88-89),

> "would never excerpt 12 questions ad seriatim from a single previous examination for inclusion in another examination; nor would they lump together a series of questions borrowed from a previous examination."

The New York Supreme Court held that respondents had acted "arbitrarily" in cancelling the examination and accordingly granted judgment voiding that administrative

determination (94-95). The New York Appellate Division affirmed on the opinion at Special Term (101). The New York Court of Appeals, however, reversed the Appellate Division and held that respondents' action was not arbitrary (Appendices A and C to Petition).

ARGUMENT

The sole issue before the State courts was the arbitrariness of an administrative act on New York State law grounds. No federal constitutional issue was raised until reargument in the New York Court of Appeals. At that point, it was too late to raise such an issue under New York practice.

Under the law of the State of New York, the exercise of the Commission's function of scheduling and conducting examinations may be the subject of judicial review only on a clear showing that the action taken by the Commission in the exercise of its conferred powers (New York City Charter § 813, subd. c), was arbitrary, capricious or unreasonable or that there was involved bad faith or illegality. *Matter of Conlon* v. *McCoy*, 22 N. Y. 2d 356, 362-363 (1968); *Matter of Wirzberger* v. *Watson*, 305 N. Y. 507, 513-514 (1953); *Matter of Cowen* v. *Reavy*, 283 N. Y. 232, 237 (1940), mot. den. 284 N. Y. 596 (1940); *Matter of Firsheim* v. *Reavy*, 263 App. Div. 490 (3rd Dept., 1942), affd., 289 N. Y. 712 (1942); *Davis* v. *Wiener*, 260 App. Div. 127 (4th Dept., (1940). In *Matter of Wirzberger* v. *Watson, supra*, 305 N. Y. 507 (1953), Chief Judge Lewis said (p. 513):

> "The decisional law on the problem is that the commission's fixing of the minimum requirements for admission to an examination is not to be interfered with by the courts if any fair argument can be made to sustain its action, '* * *' even though they may differ from the commission as to its advisability' * * *."

In its memorandum opinion the Court of Appeals held that the action of the respondents was not arbitrary. On reargument it adhered to this decision and dealt with some aspects of that decision—one, its impact on the practice of using some questions propounded on prior examinations and, two, the practicability of excising the questions in issue.

It is clear from the above that there is no federal question, substantial or otherwise, in this case. None was presented by the record, none was argued in the briefs of counsel to the New York Court of Appeals in the first instance, none is reflected in that Court's decision or opinion.

The question before the State courts was simply whether the action of respondents in cancelling the examination under the circumstances of this case was so arbitrary, capricious or unreasonable as to require the setting aside of that administrative determination. That was the sole question presented to the State courts, and it was the only question decided by the New York Supreme Court, the Appellate Division and the Court of Appeals. That Court's memorandum in deciding both this case and the companion case *Elliott* v. *Hoberman* (Appendices A and C to Petition) naturally makes no mention of any federal question. The first time the supposed federal question was raised was on the motion for reargument and on the reargument in the State Court of Appeals.

The Court of Appeals, in adhering to its original decision after the reargument, made no reference to the federal constitutional question raised for the first time in connection with the reargument. Undoubtedly, this was because it was too late to raise such an issue.

Thereafter, the petitioners applied to the Court of Appeals to amend the remittitur to recite that the federal constitutional questions were presented and necessarily passed upon by the Court of Appeals. This was opposed on the ground that, under New York practice, constitutional

issues could not be considered by the Court of Appeals unless they were raised in the lower courts, citing the following cases: *Matter of O'Neill* v. *Board of Regents*, 298 N. Y. 777 (1948; appeal dismissed); *Matter of Carroll* v. *Grumet*, 305 N. Y. 692 (1953; appeal dismissed); *Nathan* v. *Equitable Trust Co.*, 250 N. Y. 250, 253 (1929; judgment affirmed); *Nod-Away Co.* v. *Carroll*, 240 N. Y. 252 (1925; judgment affirmed); Cf., *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 128 (1945).

The Court of Appeals denied the application to amend the remittitur on June 10, 1971 (Appendix D). This clearly was an application of the consistent New York practice requiring constitutional issues to be raised in a court below the level of the Court of Appeals. This Court recognizes the validity of such a rule and refuses to entertain appeals where it has not been complied with. See STERN & GRESSMAN, *Supreme Court Practice* (Fourth Ed.), § 3.27.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

September 6, 1971.

Respectfully submitted,

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